

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE)	
APPLICATION FOR BENEFICIAL)	FINAL
WATER USE PERMIT 76H-100868)	ORDER
JAMES D. HAMILTON)	

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on May 9, 1998. Applicant filed a timely exception to the Proposal but did not request an oral argument hearing.

The Proposal recommended granting Beneficial Water Use to James D. Hamilton to appropriate 8.66 acre-feet of water from an unnamed tributary of the Bitterroot River at a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 20 Township 10 North, Range 19 West, Ravalli County, for wildlife and waterfowl. The permitted place of use is a flow-through pond located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 20. The permitted period of appropriation and use is from January 1 through December 31, inclusive of each year. The permitted means of diversion is a dam. The permitted capacity of the pond is .67 acre-foot.

Applicant pointed out the hearing was held on April 29,

1998, rather than May 1, 1998, as stated in the Proposal and the dates of the Proposal and Certificate of Service should have been June 9, 1998 instead of May 9, 1998. Those corrections are made by reference.

Applicant excepted to Finding of Fact 9, specifically the part stating "If the water ceases to flow through Applicant's proposed pond, and Objectors are in need of the water, Applicant's pond would have a four-inch diameter pipe through the dam with a control valve so the pond can be drained, releasing all the water to Objectors." (emphasis added) It is Applicant's position this is not an accurate statement under Montana Water Law. The Department agrees. Finding of Fact 5 is amended as follows:

5. Applicant has proven by a preponderance of evidence the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected. If Objectors are in need of the water, Applicant's pond would have a four-inch diameter pipe through the dam with a control valve so any water flowing into the pond could flow out of the pond to Objectors' point of diversion. The four-inch pipe would have the capacity to carry 300 gallons of water per minute, considerably more than Objectors' permitted flow rate. (Department file and testimony of Paul Callahan.)

Applicant also excepts to Condition A of the Proposed Order on the basis it should be clarified to be consistent with Montana

Water Law.

Condition A is amended as follows:

Permittee shall fill the permitted pond only when the flow rate is in excess of Objectors' flow rate or when Objectors do not need the water for their pond.

For this review, the Department must accept the Proposal's Findings if the findings are based upon competent substantial evidence. The Department may modify the conclusions of law if it disagrees with the Proposal for Decision. Mont. Code Ann. § 2-4-621(3) (1995) and Mont. Admin. R. 36.12.229 (1995). The Department has considered the exceptions and reviewed the record under these standards and the Department finds that the Proposal for Decision is supported by the record and properly applied the law to the facts with the exception of Finding of Fact 5 which is amended as stated above.

Having given the exception full consideration, the Department of Natural Resources and Conservation adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision for this Final Order except Finding of Fact 5 as stated above. Based upon the Findings of Fact and Conclusions of Law, the Department of Natural Resources and

Conservation makes the following:

FINAL ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 76H-100868 is granted to James D. Hamilton with a priority date of May 8, 1997, to appropriate 8.66 acre-feet of water from an unnamed tributary of the Bitterroot River at a point in the NW~~NE~~SE~~SE~~ of Section 20 Township 10 North, Range 19 West, Ravalli County, for wildlife and waterfowl. The permitted place of use is a flow-through pond located in the NW~~NE~~SE~~SE~~ of said Section 20. The permitted period of appropriation and use is from January 1 through December 31, inclusive of each year. The permitted means of diversion is a dam. The permitted capacity of the pond is .67 acre-foot.

A. ** FILL RESTRICTION

Permittee shall fill the permitted pond only when the flow rate is in excess of Objectors' flow rate or when Objectors do not need the water for their pond.

B. ** LIABILITY WAIVER

The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order. If a petition for judicial review is filed, the Department will transmit a copy of the tape(s) of the oral proceedings to the district court. If a party to the proceeding elects to have a written transcription prepared, that party may purchase the tapes and have a transcript prepared.

Dated this ____ day of July, 1998.

Jack Stults, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, MT 59620-1601
(406) 444-6605

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Final Order was served upon all parties listed below this ____ day of July, 1998.

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Mandi Shulund
Hearing Assistant

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE)	PROPOSAL
APPLICATION FOR BENEFICIAL)	FOR
WATER USE PERMIT 76H-100868)	DECISION
JAMES D. HAMILTON)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on May 1, 1997, in Hamilton, Montana, to determine whether a beneficial water use permit should be granted to James D. Hamilton, (Applicant) for the above application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1997).

APPEARANCES

Applicant, James D. Hamilton, appeared at the hearing in person and by and through counsel, David L. Pengelly. John Westenberg, Senior Water Rights Specialist and C. Paul Callahan, Hydrologist, both with Land & Water Consulting, Inc., appeared at the hearing as witnesses for Applicant.

Objectors, Margaret and Kent Bartschi, appeared at the hearing in person. Anne Agner Raines, former owner of the Bartschi property, appeared at the hearing as a witness for Objectors.

Wes McAlpin, Water Resources Specialist with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing and was called to testify by Objectors.

EXHIBITS

Applicant offered five exhibits for the record. All were accepted into the record without objection.

Applicant's Exhibit 1 which consists of two pages, is the curriculum vitae of John Westenberg.

Applicant's Exhibit 2 is a copy of page one of the water use application supplement attachment submitted by R. H. (Arlo) White and Anne Agner for 76H-P086784. The pertinent portion of this exhibit is the water measurements taken in the proposed source.

Applicant's Exhibit 3 consists of eight pages and is a copy of the Department's Administrative Policy No. 20, *Fish, Wildlife, and Recreation Ponds*. The particular portion of this policy for this hearing is V. "Beneficial Use of Water," Part A. "Exchange Rate," paragraph three, at the top of page 4.

Applicant's Exhibit 4 consists of two pages and is the curriculum vitae of C. Paul Callahan.

Applicant's Exhibit 5 is a copy of a letter dated April 9, 1998, to Kent and Margaret Bartschi from Don S. Mullin of Lone Rock Company.

Objectors offered no exhibits for the record.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. An application for beneficial water use permit in the name of and signed by James D. Hamilton was received by the Department on May 8, 1997, at 10:27 a.m. (Department file.)

2. Pertinent portions of the application were published in the *Missoulian*, a newspaper of general circulation in the area of the source, on November 12, 1997. Additionally, the Department served notice on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. One timely objection was received by the Department. Applicants were notified of the objection by a letter from the Department dated December 10, 1997. (Department file.)

3. Applicant proposes to appropriate 8.66 acre-feet of water from an unnamed tributary of the Bitterroot River at a point in the NW~~NE~~SE~~SE~~ of Section 20 Township 10 North, Range 19 West, Ravalli County, for wildlife and waterfowl. The proposed place of use is a shallow flow-through pond located in the NW~~NE~~SE~~SE~~ of said Section 20. The proposed maximum depth is approximately seven feet. The proposed period of appropriation and use is from January 1 through December 31, inclusive of each year. The proposed means of diversion is a dam. The proposed capacity of the pond is .67 acre-foot. (Department file and testimony of Applicant, Paul Callahan, and John Westenberg.)

4. Applicant has proven by a preponderance of evidence there is water physically available at the proposed point of diversion in the amount Applicant seeks to appropriate and water can reasonably be considered legally available, in the amount requested, during the period Applicant seeks to appropriate.

Applicant seeks to appropriate 8.66 acre-feet of water to fill a 0.67 acre-foot flow-through pond and provide an exchange rate of 30 days. To accomplish this, a constant flow of 5.37 gallons per minute would be needed. Mr. Westenberg measured the flow of the springs at Applicant's point of diversion on March 6, 1997, at 128 gallons per minute. However, 1997 was wet year and this measurement may be inflated by 130 percent, then the measurement would be approximately 90 gallons per minute. Arlo White, predecessor of the Bartschis, measured the water 13 times at his proposed point of diversion, three times in 1991, six times in 1992 and four times in 1993. Those measurements ranged from 28 gallons per minute to 493 gallons per minute. Mr. Westenberg walked down gradient from the springs to Applicant's property boundary and found no other source of water. On March 13, 1998, Don Mullin, with Lone Rock Company, walked up gradient to the boundary of the Applicant's property line and found no other source of water. Mr. Mullin concluded that the bulk of the water flowing past Objectors' property originates on Applicant's property. Objector stated there are springs which appeared on his property, after Mr. Mullin was there, which add to the water available for Objectors; however, he had no measurements or other evidence to substantiate this statement except the testimony of Anne Raines who estimated these springs, when they flow, add maybe 5 to 10 percent more water to the stream. Mrs. Raines

wasn't sure if they were springs or upstream flow that had gone underground and surfaced again. Considering this information, the measurements taken by Arlo White are a fair representation of the flow rate at Applicant's point of diversion. The ravine in which these springs are located is also used as a waste water drain by Bitterroot Irrigation District, (BRID) greatly increasing the flow of water during the irrigation season, usually from May to end of September. (Applicant's Exhibits 2 and 5 and testimony of Applicant, John Westenberg, Anne Raines and Kent Bartschi.

Applicant's use would be nonconsumptive. With the exception of the .67 acre-foot of water needed to fill the pond, the water would flow through the pond exchanging some of the "old" water with some of the "new." The only loss would be from evaporation which would be offset by the removal of the cattails at the proposed pond site. That is, the evapotranspiration of the cattails is equal to the expected evaporation from the surface of the pond. There may be some seepage loss; however, it would not be a great amount and would continue downstream for use by Objectors. Therefore, if the pond is filled when there is excess water, either during the low demand periods or when BRID waste water is available, all the water that flows through the pond would flow down to Objectors. Water can reasonably be considered legally available during the period which Applicant seeks to appropriate, in the amount requested. (Testimony of Applicant, John Westenberg, and Paul Callahan.)

5. Applicant has proven by a preponderance of evidence the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected.

If the water ceases to flow through Applicant's proposed pond, and Objectors are in need of the water, Applicant's pond would have a four-inch diameter pipe through the dam with a control valve so the pond can be drained, releasing all the water to Objectors. The four-inch pipe would have the capacity to carry 300 gallons of water per minute, considerably more than Objectors permitted flow rate. (Department file and testimony of Paul Callahan.)

6. Applicant has proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate.

The proposed means of diversion is an earthen dam 117 feet long, 6 feet wide at the crest, and 38 feet wide at the base. Total dam height would be 8 feet with a spillway height of 7 feet. Water would normally flow through the reservoir created by the dam through a 36-inch CMP standpipe. The inlet of the standpipe would lie 1 foot lower than the dam crest and 6 inches lower than the spillway. A staff gauge would be affixed to the standpipe to measure flows through the impoundment. A four-inch diameter pipe with a control valve would extend through the dam and into the bottom of the reservoir, enabling the reservoir to be drawn down if call is made by down stream appropriators. To keep debris from obstructing the pipe, a two-foot cube screen would be fitted on the pipe inlet in the reservoir.
(Department file and testimony of Paul Callahan.)

7. Applicant has proven by a preponderance of evidence the proposed uses of water, wildlife and waterfowl, are beneficial uses. The purpose of the pond is to attract waterfowl, especially ducks. Mont. Code Ann. § 85-2-102(2)(a) (1997)
(Department file and testimony of Applicant.)

8. Applicant has proven by a preponderance of evidence he has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

Applicant owns the property where the water will be put to beneficial use. (Department file and testimony of Applicant.)

9. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit.

Based upon the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. §§ 85-2-307 and 309 (1997).

2. Applicant has met all the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 through 9. Mont. Code Ann. § 85-2-311 (1997).

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 76H-100868 is granted to James D. Hamilton with a priority date of May 8, 1997, to appropriate 8.66 acre-feet of water from an unnamed tributary of the Bitterroot River at a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 20 Township 10 North, Range 19 West, Ravalli County, for wildlife and waterfowl. The permitted place of use is a flow-through pond located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 20. The permitted period of appropriation and use is from January 1 through December 31, inclusive of each year. The permitted means of diversion is a dam. The permitted capacity of the pond is .67 acre-foot.

A. ** FILL RESTRICTION

Permittee shall only fill his pond when the Objectors do not need the water to fill the objectors' pond.

B. ** LIABILITY WAIVER

The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the record. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record will be accorded little attention. Any exception containing obscene, lewd, profane, or abusive language shall be returned to the sender. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

Dated this ____ day of May 1998.

Vivian A. Lighthizer
Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Proposal for Decision was served upon all parties listed below this ____ day of May, 1998.

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